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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JAN 17 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected the subsequent appeal as improperly filed. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist at [redacted] Missouri. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.5, which govern motions to reopen and to reconsider, contain no provision to allow motions on rejected appeals.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner filed the Form I-140 petition on July 10, 2007. The director denied the petition on June 11, 2008. On July 11, 2008, a person claiming to be attorney [redacted] filed Form I-290B, Notice of Appeal or Motion. AAO inquiries, however, revealed that an unnamed third party had used [redacted] name without his knowledge or consent.

In a notice issued January 27, 2010, the AAO rejected the appeal, stating:

> There is no credible evidence that the individual who signed the Form I-290B, Notice of Appeal, is in fact an attorney in good standing. Rather, we conclude that an unknown individual at [redacted] impersonated [redacted] in this proceeding and filed the appeal under false pretenses.
>
> An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded. 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).
>
> Because the alleged attorney of record, who purportedly signed the appeal form, has disavowed any knowledge of proceedings arising from [redacted]

> we cannot find that the appeal was properly filed by a qualified attorney or representative. We therefore reject the appeal as improperly filed.

On motion, counsel maintains that the petitioner should not bear the consequences of another's actions. Counsel asserts that the petitioner was unaware of the impersonation committed by the party that filed the appeal (but counsel acknowledges that the petitioner does not claim ever to have met [redacted] in person, working instead through an intermediary identified as [redacted].

Only certain parties may file an appeal. The petitioner, as the affected party with standing in the proceeding, can file an appeal, and the USCIS regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states that an affected party may be represented by an attorney or representative in accordance with 8 C.F.R. § 292. Anyone filing on the petitioner's behalf must, therefore, qualify as an attorney or representative under the pertinent regulations. This procedural requirement insures professional accountability on the part of those acting on behalf of affected parties in immigration proceedings. These safeguards are meaningless if USCIS agrees to accept filings by anonymous or pseudonymous individuals under false pretenses. Likewise, if the AAO were to agree to accept filings by an unqualified party simply based on the petitioner's claim to have been unaware of the party's deceitful conduct, such a practice would invite abuse. There exists no provision to allow an unqualified party to file an appeal provided that the party has falsely convinced the petitioner of his or her credentials as an attorney or representative, and there exists no provision to allow USCIS to accept such a filing.

Counsel does not identify any erroneous conclusion of fact or law in the AAO's rejection notice. Counsel simply maintains that, given the unusual circumstances, the AAO should disregard the regulatory provisions that limit who may lawfully file an appeal.

The regulations are binding on USCIS employees, including AAO officers, in their administration of the Act, and USCIS employees do not have the authority to allow for appeal rights where none exist. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner,* 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down). The AAO cannot and will not construe mandatory compliance with USCIS regulations as an error of law. Therefore, the present filing does not meet the requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3).

Counsel's only new claim of fact is that the petitioner was unaware that [redacted] had fraudulently used [redacted] name and legal credentials. Counsel provides no affidavits or other evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the present filing does not meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2).

Because the filing does not qualify as either a motion to reopen or a motion to reconsider, the AAO must dismiss the filing under the regulation at 8 C.F.R. § 103.5(a)(4).

The AAO notes that the petitioner has subsequently filed a new petition seeking the same classification (also with a national interest waiver of the job offer requirement). The petitioner filed the new petition, receipt number [redacted], with the Nebraska Service Center on November 10, 2010. The Director, Nebraska Service Center, approved that petition on April 7, 2011. The petitioner, therefore, has received the classification (and waiver) that he originally sought. The dismissal of the present motion is without prejudice to any future proceedings arising from the approved petition.

ORDER: The motion is dismissed.